IN THE

Supreme Court of the United States,

OF OCTOBER TERM, A. D. 1877. No. 1,029.

WILLIAM R. FOSDICK, ET AL., *Appellants*,
v.
THE SOUTH WESTERN CAR COMPANY, *Appellee*.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF APPELLEE.

R. BIDDLE ROBERTS,
SOLICITOR.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 101 RANDOLPH STREET.
1878.

That portion of the record which I have denominated "Additional Record," brought here by virtue of the **certiorari** *ordered by this Court on the 4th inst., not having been printed before the time at which I was compelled to file my Brief, I have had necessarily to refer to the paging of the "Original," and beg to make this apology to the Court.*

R. BIDDLE ROBERTS.

Feb. 23d, 1878.

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Statement of Case for Appellee.

It is true that the Chicago, Danville and Vincennes Railroad Company was chartered as stated in the appellants' brief, and that it did borrow money substantially as stated, and that there was a foreclosure of the mortgage. It is true that the bill was filed on the 27th day of February, 1875, in the Circuit Court of the United States for the Northern District of Illinois; but it is also true that Stephen Osgood, a bondholder, had prior to that, filed a Bill in Chancery in the Circuit Court of Will County, in the State of Illinois, and that Brown & Hammond had been appointed Receivers, and that they took possession of the Railroad on the 22d day of February, 1875, and held it by virtue of that proceeding until the appointment of General Anderson, in the Fish and Fosdick case, in the Circuit Court of the United States, who relieved Messrs. Brown and Hammond on the first of June, 1875.

That portion of the Record which has been brought here by virtue of a *certiorari* issued by this Court, will show that the Osgood case was the one in which Receivers were first appointed; that that case was removed into the Circuit Court of the United States for the Northern District of Illinois on the application of the respondents.

Additional Record, p. [illegible], filed in No. 940 present term.

and that a motion was subsequently made to consolidate that case with the case of Fosdick and Fish, the trustees, which motion was refused, but the said Osgood was permitted to intervene, and did intervene, in the Fosdick and Fish case.

Printed Record, p. 67.

It will further appear, that by virtue of the removal of the cause to the Circuit Court of the United States, that Brown and Hammond, the Receivers appointed by the Circuit Court of Will County, Illinois, made their final Reports to the Circuit Court of the United States in the Osgood case, paying for supplies and other necessaries for the actual working of the Road under the direction of the Court,

Additional Record, p. , filed in No. 940 present term,

and were succeeded, as has been stated, by General Anderson, the Receiver appointed by the United States Court in the Fosdick and Fish case.

The road was, therefore, in the hands of Receivers, on the application of Bondholders and Bondholders' trustees, from the 22d of February, 1875, until the time of the sale and delivery to the purchasers, April 17th, 1877. Thus, from the 22d day of February, 1875, to the 1st of June, 1875, held by Brown and Hammond, the Receivers in the Osgood case,

Additional Record, p. , filed in No. 940 present term,

and from the 1st of June, 1875, to the 17th of April, 1877, held by General Anderson, the Receiver appointed in the Fosdick and Fish case.

Printed Record, p. 1.

Although General Anderson's appointment was made on the 20th of May, 1875, he did not give bail, or actually relieve Brown and Hammond until the 1st of June, 1875.

The case of Fosdick and Fish against the road, in which the appellees in this case are intervenors, and in which case the decree of sale was had, has not been appealed from, and therefore, the main case is not in this court; and so far as this record is concerned, there is no evidence that Fosdick and Fish, the complainants in the main action, ever sought or prayed an appeal, not having joined in the Bond.

Printed Record, page 107.

And this case is brought here, it will be observed, by the vendees or purchasers at the sale, although before that, Bondholders, without even the assent of the counsel for the trustees.

It is respectfully suggested, that this is an important fact to be borne in mind in the subsequent examination of the case, because, whatever the rights of Fosdick and Fish, the trustees, may have been, it does not follow that the vendees succeeded to all of them.

Most all the allowances made by the Court for this and kindred claims were acquiesced in by all the parties and counsel concerned, and many of the orders were entered by consent, no resistance being made to any of them until it was apparent that the powers of the Circuit Court were nearing a conclusion.

In support of this statement the attention of the Court is called to the list of claims paid by consent.

Additional Record, page , filed in No. 940 present term.

And the opposition now made is in gross violation of the tacit understanding had by the Court, parties and counsel, that if this road was to be held by Receivers, and the power of the Court invoked to run it and manage it for the benefit of the Bondholders, these claims incurred for their benefit and in their interest were to be paid, which understanding was acquiesced in by all the parties concerned, all having knowledge of it, and is only violated in this and two other instances.

The contracts under which this claim is made are fully set forth in the petition of the South-Western Car Company,

Printed Record, page 74,

as also in the order of the Court below, directing the payment of the claim.

Printed Record, page 106.

The contracts of the Railroad Company with Bristol and South Wales Wagon Company and with W. Adams, in which appellees had a one-tenth interest, are best described and will be best understood by an examination of the petition of appellees with accompanying copies of agreements and schedules.

Printed Record, pages 74 to 80 inclusive.

The attention of the Court is also called to the testimony of General Anderson.

Printed Record, pages 103, 104, 105,

and to the agreement with the Receiver therein recited, and the final order of the Court for the payment of the said claims.

Printed Record, page 106.

The contracts between the Railroad Company and the

Bristol and South Wales Wagon Company, and W. Adams and the appellee, provided that at all times during such tenancy, the name, number, plate and other insignia of ownership of lessees of the cars, should be fixed and retained upon each of the said cars, for the purpose of making the ownership publicly known.

Printed Record, page 78.

The contracts of the Railroad Company with the Bristol and South Wales Wagon Company, and with W. Adams, for the leasing of 100 box cars, in which appellees had a one-tenth interest, were directly ordered by the Court below, to be completed, in the order made on the Receiver, December 13, 1875, (*vide* Additional Record, page [illegible],) and were carried out in good faith. It is upon this one-tenth interest in those same contracts that a portion of the claim, ($5,500,) for which the decree was entered in the Court below was founded.

These cars were delivered on or about January 25, 1875, and were taken possession of by the Receivers, on the 22nd of February *within thirty days.*

ARGUMENT FOR APPELLEE.

I.

The cases of *McCarty* v. *Carter*, 49 Ills., 257, and *Judson* v. *Stephens*, 75 Ills., 257, cited by appellant, (p. 10,) are not analogous to this one. In those cases a party holding a leasehold interest, contracted for the erection of a building, and in the former, the Court held that the receipt of rents by owner was not a ratification of the building contract, and in the latter, that under the statute the mechanic could only claim a lien upon the interest of lessee.

The cases of

Reed v. *Bank of Tenn.*, 1 Sneed., 262,
Jessup v. *Stone*, 13 Wis., 466,
Prior v. *Munn*, 4 Cal., 175,

all hinged upon the peculiar phraseology of the statutes in those States, and can have no bearing on this case.

In the cases of

Otley v. *Howland*, 36 Miss., 19, and
Getchell v. *Allen*, 34 Iowa, 562,

the courts hold that the mechanic is entitled to a lien upon the *building* erected on mortgaged premises, though not on the land, the Iowa court making a distinction which the counsel, in citing, very carefully omitted, between a new building erected and repairs made on an old one.

Smith v. *Hughes*, 24 Ill., 270.

does not announce any such doctrine as claimed, and in the cases *Williams* v. *Chapman*, 17 Ill., 423, and *McLogan* v. *Brown*, 11 *id.*, 519, the question was not directly raised, the cases being decided, the first, on the ground that mortgagors, and the other, that judgment creditors were not made parties to the proceedings.

Dunn v. *N. Mo. R. R.*, 24 Mo., 493,
McAuley v. *W. Vt. R. R.*, 33 Vt., 323,

were decided on an entirely different state of facts from those existing in the case under consideration, and turned mainly on the construction of the statutes of those States.

II.

Appellee is clearly entitled to a lien to the amount of the value of the cars furnished.

On the 1st of July, 1872, the Legislature of the State of Illinois enacted the following.

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That all persons who may have furnished, or who shall hereafter furnish, to any railroad corporation, now existing, or hereafter to be organized under the laws of this State, any fuel, ties, materials, supplies, or any other article or thing necessary for the construction, maintenance, operation, or repair of such roads, by contract with said corporation; or who shall have done and performed, or shall hereafter do and perform, any work or labor for such construction, maintenance, operation, or repair, by like contract, shall be entitled to be paid for the same as part of the current expenses of said road, and, in order to secure the same, shall have a lien upon all the property, real, personal, and mixed, of said railroad corporation, as against such railroad, and as against all mortgages, or other liens, which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor: *Provided*, suit shall be commenced within six months *after such contractor or laborer shall have completed* his contract with said railroad corporation, or after such labor shall have been performed, or material furnished." (Revised Stat. of Ills., 1877, Chap. 82, p. 639.)

These cars were furnished to the Railroad Company during January, 1875, under what is commonly called a "rent contract," the contract providing for the leasing of the cars, at a certain rent, payable monthly, and giving the lessees at the termination of the lease, the option of purchasing the property, by making a small additional payment.

Clearly, the cars were supplies necessary for the operation of the road, within the meaning of the statute.

Waiving for the present, the question whether appellee is entitled to these specific cars, by virtue of the contract, we shall endeavor to show, that appellee is entitled to a lien upon any and all personal property owned by the Railroad Company.

The trust deed relied upon by appellees is a *nullity, so far as it seeks to mortgage personal property* of the Railroad Company.

The Constitution of the State of Illinois, adopted by the people of that State, July 2d, 1870, and in force August 8th, 1870, provides as follows:

"The rolling stock, and all other movable property, belonging to any railroad company, or corporation, in this State, shall be considered personal property, and shall be liable to execution and sale, in the same manner as the personal property of individuals; and the General Assembly shall pass no law exempting any such property from execution and sale." (Const. State of Ill., 1870, Article 11, Sec. 10.)

The trust deed relied upon by appellees is a *nullity so far as it seeks to mortgage personal property* of the Railroad Company.

The Statute of Illinois, regulating the execution, acknowledgment and recording of chattel mortgages, is as follows:

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That no mortgage, or trust deed, or other con-

veyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to, and remain with the grantee; or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded, as hereinafter directed, and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage.

"2. Such instrument may be acknowledged before a *Justice of the Peace* of the town or district where the mortgagor resides, or, if the mortgagor is not a resident of this State at the time of making the acknowledgment, then before any officer authorized by law to take acknowledgments of deeds. The certificate of acknowledgment may be in the following form: * * *

"3. If the acknowledgment is of a resident of this State, the Justice of the Peace shall enter in his docket a memorandum thereof, substantially as follows: * * *

"4. Such mortgage, trust deed, or other conveyance of personal property, acknowledged as provided in this act, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded; or, in case the mortgagor is not a resident of this State, then in the county where the property is situated and kept; and shall, thereupon, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation: *Provided*, such time shall not exceed two years." (Ill. Rev. Stat., 1877, Ch. 95, Secs. 1, 2, 3, and 4, p. 674.)

The Supreme Court of Illinois have frequently had occasion to construe this statute. It has repeatedly been held that to give an instrument the effect of a chattel mortgage, when the mortgaged property remains in the possession of the mortgagor, the requirements of the statute must be strictly complied with. The failure to have the instrument acknowledged before a *Justice of the Peace of the town or district where the mortgagor resides*, is a fatal defect.

Gregg v. *Sanford*, 24 Ills., 17.
Henderson v. *Morgan*, 26 Ills., 431.
Porter v. *Dement*, 35 Ills., 478.

The grantor in this case, was a *resident of the State of Illinois*, and the instrument purporting to convey chattel interests was acknowledged *before a Notary Public of New York City.*

That Court has also laid down the rule that railroad corporations, as well as individuals, are governed by the law prescribing how personal property shall be mortgaged.

In the case of *Palmer* v. *Forbes*, 23 Ills., 248, cited by appellant, and so quoted as to convey the impression that he was giving continuously the portion of the opinion embodied in his argument (p. 15) the Supreme Court say:

"The road and property of the company may include its personal property, as well as the real estate, consisting of the road and its appurtenances. As there is no specification as to how personal property shall be mortgaged, the *general law regulating chattel mortgages is left to regulate the mode of executing that power.*"

The trust deed relied upon by appellants was void in any event as to personal property acquired after its execution.

Subsequently acquired property is not held by a chattel mortgage, but if property comes into the possession of the mortgagor *before other liens attach*, it may create an equitable lien which a court of chancery will recognize and enforce.

Hunt v. *Bullock*, 23 Ills., 325.
Gregg v. *Sanford*, 24 Ills., 17.
Titus v. *Maher*, 25 Ills., 257.

Even if the trust deed had been properly acknowledged, it could not, under the statute, have bound personal property for more than two years from its execution, and at the end of that time, the personal property of the

Railroad Company would have been subject to the lien of the contractor or laborer.

Cook v. *Thayer*, 11 Ills., 617.

It is evident, then, that appellants did not, by the trust deed, acquire any lien upon the personal property of the Railroad Company, that could shut out the lien given by the statute to the person furnishing labor or supplies.

Appellee has not lost its lien by the delay in filing its petition.

The possession of the Receiver was for the benefit of all parties who might at the determination of the suit be found to be entitled to the property, and prevented the lapsing of the lien of appellees by limitation.

Wrixon v. *Vize*, 3 Dr. and War., 104.

The statute of Illinois, before cited, limits the time for petitioning for such lien as follows: "*Provided* suit shall be "commenced within six months *after such contractor or* "*laborer shall have completed his contract* with said rail- "road corporation, or after such labor shall have been "performed or material furnished."

At the time of filing the petition of appellees the contract could not have been said to be completed.

If there was in the possession of the railroad company, at the appointment of the Receiver, any personal property, appellee is entitled to a lien upon it to the amount of its claim. All the property of the Road, real, personal and mixed, was subject to the payment of its debts. On the real estate the appellants and the other Bondholders had a first and prior lien. On the personal property the appellee's lien had precedence over that of appellants.

A similar distinction was made in two cases, cited be-

low, when the courts held the lien of a mortgage to be prior to that of a mechanic on the *land*, but gave precedence to the lien of the mechanic on a *building* erected on the premises subsequent to the record of the mortgage.

Otley v. *Haviland*, 36 Miss., 19.
Getchell v. *Allen*, 34 Iowa, 562.

If then the railroad company, at the time of the filing of petition by appellee, had enough personal property to cover the amount of the decree, no harm has been done appellants, and the court below has committed no error.

There is enough in the record to show that large quantities of rolling stock had been purchased by the Railroad Company since the adoption of the constitution of 1870, notably, the nine-tenths interest in one hundred box cars. All this must be held to be personal property, and as such, not covered by the lien of the trust deed. Between the mechanic or material man and the principal debtor, the limitation clause in the statute relating to mechanics' liens has no application.

Jennings v. *Hinkle*, 81 Ills., 183.

Appellants, claiming under a trust deed void as to personal property, will not be allowed to contest the lien of appellee upon such property.

III.

By the terms of the trust deed, before any of the proceeds of the sale could be applied to the payment of the bonds, the trustees were required to deduct all advances and liabilities which had been made or incurred by the trustees in operating the said railroad and property, and

in managing its business and affairs while in possession, and all payments for taxes, *charges* and assessments on, *said premises, or any part thereof.*

Printed Record, p. 19.

Surely, under this clause of the mortgage, the Court was authorized to enter the decree it did, *in the absence of any statute prescribing a lien,* and it was done in precise accordance with the prayer of the complainants in their original bill:

"And that pending this suit a Receiver may be appointed, of all and singular of the said railroad, with all its appurtenances, franchises, rolling stock or equipment, and all the income and earnings thereof, and all other of said mortgaged premises, properties, rights, and equities, *with such orders and directions in respect to such receivership and the fruits thereof as shall be equitable and proper,* and that your orator may have such other and further relief, &c."

Additional Record, p. 5.

The Amended Bill, it will be observed, does not pray the appointment of a Receiver, simply asking that the one appointed by virtue of the prayer of the Original Bill, may still hold the road, and hence the necessity of the production of the Original Bill, omitted in appellants' record.

IV.

Appellee is entitled to the sum decreed it, or the possession of the cars, under its contract with the Railroad Company, in the absence of any statutory lien.

So far as we have been able to ascertain, no Court has yet decided that a contract, similar to the one in controversy, was void, or of no validity as *between the parties*

and their privies. It is only as to innocent purchasers and judgment creditors that such an agreement is void.

The reason of the rule is, that the transfer of the possession of personal property without a transfer of title, might enable the holder and apparent owner to obtain credit on the strength of such possession.

The reason of the rule is entirely lacking in this case. It was provided in the contract, "that at all times during "such tenancy the name, number and plate and other "marks and insignia of ownership shall be fixed and re-"tained upon each of the said cars."

Printed Record, p. 78.

This *was no secret lien*, but proclaimed to all who saw the cars, wherever they might be, that they did not belong to the Railroad Company, and was a much more effectual notice to the public than the recording of any intrument could be.

Even the Trustees and Bondholders, we apprehend, would be bound to take notice of this, as they in fact did, their Receiver testifying:

"The Car Company retained the title to the cars, and "the cars now belong to the Southwestern Car Com-"pany. The railroad has really no title to them."

Printed Record, p. 104.

The doctrine has never been carried to the extent claimed by appellant, that a mortgagee, as regards such a contract, occupies the position of a judgment creditor or innocent purchaser. As well might the mortgagee of a farm and stock, claim the horse of a neighbor at pasture on the premises.

We have yet to find a case where such a rule has

been announced in a Court of Chancery. The whole tenor of equity jurisprudence is against it.

The cases in the Illinois Reports cited by appellant, in which such contracts have been construed and adjudicated upon, were all suits at law, where the rights of innocent parties had intervened, and in the case of *Hervey* v. *R. I. Locomotive Co.*, 4 Otto, 664, the Locomotive Co. replevied an engine which appellant had purchased at a sheriff's sale, by virtue of an execution against the person having possession of the locomotive.

In each of these cases any other rule than that adopted by the Court would infringe the rights of innocent parties.

Can it be for a moment seriously controverted that the *equities* of the appellees are greater than those of appellants?

Default was made in the payment of the interest in October, 1873. The Bondholders allowed the Railroad Company to retain possession of its property, and to execute new contracts relating to the operation of the road, thus virtually recognizing and authorizing such contracts. In January, 1875, a contract is made for the furnishing of cars to the Railroad Company, and in the following month the Bondholders swoop down on the property, claiming to hold by virtue of a mortgage absolutely void, as to chattel interests, the cars of appellee, on which no payment whatever has been made.

The tendency of courts has been to sustain contracts reasonable and *bona fide* between the mortgagor and others, especially when the object is to *carry on the business which is mortgaged, or involved in the mortgage.*

Fay v. *Cheney*, 14 Pick, (Mass.,) 399.

We cannot think that a court of equity will lend its assistance to any such lawless and unjust confiscation of property as is here attempted.

It will be noticed that the trustees and complainants in the original case, though nominally having prayed an appeal, do not sign the bond, and this appeal is prosecuted in the interests of the purchasers, who had notice at the time of sale of the claim of appellee.

V.

Thus far we have discussed this case in what may be termed technically, its legal and equitable aspect under the decisions cited, and the form of argument presented by appellant. And while we feel we are clearly right, and entitled to the order of the Circuit Court, under the law and decisions given, we come now to the broader or more general view of the case, as applicable to its peculiar condition.

Much has been said in appellant's brief about what is termed "sentimental equity." We are not familiar with that kind of equity, and we feel confident that it is the first time that any decision of the learned and able judge of the Circuit Court for the Northern District of Illinois, has been so spoken of, and that he and his friends will be somewhat surprised at the charge.

His Honor, Judge DRUMMOND, in making the allowances that he has made in this case, as well as in others of a similar sort, did take a broader view of his powers as a chancellor, than those which might be derived from any pre-supposed lien.

And in a case in which some similar questions arose, decided in May last, he has thus expressed himself, *inter alia :*

" Now these principles are applicable, I think, to contracts that have been offered in evidence in this case, and under which claims are made against the railroad. For whatever has been performed or done under these contracts which has gone to the benefit of the railroads, compensation should be given, not upon the rule of the contracts themselves, but upon the principles of justice and equity that a railroad company should not receive anything for which compensation should not be given. A Court, in taking the management and control of and operating a railroad, has to lay down some rule in relation to paying parties who have furnished materials and supplies, and who have performed work. And it will always happen whenever a Court takes control of a railroad that at that time there will be services being performed ; there will be materials and supplies being furnished and which have been recently furnished, and work which has just been done. Now it is hardly practicable or possible for a Court of Equity to say that the very moment that the Court has taken possession of the road, that all compensation for anything that has been done previously, or for any supplies that have been furnished previously shall then, at that moment, be stopped, and that for everything that is obtained in the future or done in the future, that alone shall be paid for by the Receiver. It has been found indispensable, and as an act of justice and equity to those who are dealing with railroads, that there shall be some allowance made for past services, and for materials and supplies which have been furnished in the past. Of course it is always a matter of very great difficulty, and a question of very great doubt, where you are to fix the line, when you shall say you will allow compensation to be made. As I stated during the argument, we have adopted a rule in this State which has the advantage of being a fixed and permanent rule. That is to say, a limitation which furnishes a sort of guide, so that it is not a rule to be controlled and governed by the equities and hardships of each particular case ; but that while the Court will look to all the circumstances and facts in each particular case, there shall be what may be called a fixed rule established. It may be a matter of doubt, perhaps, whether the Court has not gone too far under the decision of the Supreme Court of the United States in allowing these claims, gone too far back, that is to say ; however, I do not feel inclined to depart from the practice which has been established. It does allow the employees or persons who have done work,

persons who have furnished supplies and materials, a compensation for all that has been done, and all the suppiles that have been furnished within a reasonable time; and of course there must be a limit to this. It is impossible for the Court, in view of the just protection which should be given to those who have claims upon the road to go back an indefinite time; and if the road has allowed large accumulations of indebtedness to exist against it, to pay all that indebtedness, whatever it may be, and how far-soever back it might go."

Turner v. *Ind., Bloom. & W. Ry. Co., et al.*

From the inception of this case, down to the sale, the powers of a court of chancery were invoked by and used for the exclusive benefit of these bondholders, asking for that species of decree which a court of chancery alone could give them, declaring the whole amount of the mortgage due, simply upon a default of interest, which certainly could not be conscientiously exercised without a careful guardianship of the interests of all involved in the result of such a decree.

The appointment of a Receiver in equity is the exercise of an extraordinary power, and that aid and the exercise of that power, and the immense stretch of a chancellor were invoked by those very people who now find fault with the smaller decrees. The Receivers were appointed that their rights might be concentrated, their property protected, and the interests they had in this line of railway be preserved from the time the Receivers went into possession until the property was turned over to the purchasers.

For the benefit of these appellants, all this property, which, had it been permitted to remain idle, would have deteriorated until it became almost valueless, was preserved, maintained, operated, and its value actually increased, under the direction of the court and its Receivers.

For their advantage, these cars were hired and used, and were, the Receiver tells us, indispensable to the working of the road. These cars carried their freight, and brought in their revenue.

Can it now be said, in a court of equity, that the very beneficiaries, from the protection given, are to defraud still further these unfortunate manufacturers? *Certainly it is not just, and therefore cannot be equitable.*

R. BIDDLE ROBERTS.

CHICAGO, FEBRUARY, 1878.

IN THE

United States Supreme Court.

OCTOBER TERM, A. D. 1878.

WILLIAM R. FOSDICK, ET AL.,
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THE SOUTH WESTERN CAR COMPANY,
Appellee.
AND
FREDERICK W. HUIDEKOPER, ET AL.,
Appellants,
vs.
THE HINKLEY LOCOMOTIVE WORKS,
Appellee.

Appeals from the Circuit Court of the U. S. for the Northern District of Illinois.

Numbers 630 and 573.
Present Term Docket.

Argument in Behalf of Appellees.

By JOHN M. BUTLER,
SOLICITOR.

INDIANAPOLIS:
Baker & Randolph, Printers, Binders and Blank Book Manufacturers.
1878.

IN THE

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Argument in Behalf of Appellees.

By JOHN M. BUTLER.

Not being of counsel in the above entitled causes, no attempt will be made to brief them upon their particular facts and records.

Under the permission granted by the Court, and by courtesy of R. Biddle Roberts, Esq., Solicitor for Appel-

lees, this argument is submitted as applicable to the main questions involved in these Appeals.

I.

The possession of a railway and the equipment in use upon it, taken by a receiver under appointment of a court, changes no right of ownership of any part of the property taken into possession by the receiver: It perfects no title to any part of the property taken into possession: It gives no new or added right or title to any part of the property taken into possession: It changes no contract regarding the ownership of any part of the property taken into possession; but is solely and only a holding by the same title, and subject to the same contracts, limitations and conditions of title that the railway company held the property by, and subject to, at the time of the appointment of the receiver.

"The appointment of a receiver determines no right, "and in no way affects the title of the property; his "holding is the holding of the court for him from whom "the possession is taken."

Edwards on Receivers, 2d ed., p. 12.

"A receiver of a corporation is not regarded as a "purchaser for a valuable consideration, but as its vol- "untary assignee and personal representative."

Edwards on Receivers, 2d ed., p. 4.

"He is appointed for the benefit of all parties who "may establish rights in the cause; and the money (or "property) in his hands is in *custodia legis* for whoever "can make out a title to it."

Edwards on Receivers, 2d ed., p. 3.

"The receiver of an insolvent corporation can not "impeach or disaffirm the lawful and authorized acts of "the corporation."

Edwards on Receivers, 2d ed., p. 165.

"A receiver appointed by the court is appointed on "behalf of all parties, and not of the plaintiff, or "of one defendant only. * * * The effect of the "appointment, however, is not to oust any party of his "right to the possession of the property, but merely "to retain it for the benefit of the party who may ulti- "mately appear to be entitled to it."

Daniells' Chancery, vol. 2, chap. 28, sec. 3.

"A receiver is vested by law with the powers of the "corporators and the estate of the corporation; *and for* "*the purpose of determining the extent of his power and title*, "*he represents the body itself.* * * * His appointment "does not change the rights of action, *or the contract* "*relations of the corporation.*"

Field on Corporations, sec. 419, 420.

"A receiver being appointed for the preservation of "the fund or property *pendente lite*, and for its ultimate "disposal according to the rights and priorities of the "parties entitled, the remedy is regarded in the nature of "a sequestration rather than an attachment of the pro- "perty, and it ordinarily gives no advantage or priority "to the person at whose instance the appointment is "made, over other parties in interest. *Nor does it change* "*the title or create any lien upon the property*, its purpose "in this respect being rather like that of an injunction "*pendente lite*, to preserve the subject matter until the "rights of all parties can be judicially determined."

High on Receivers, sec. 5.

"The appointment of a receiver over a corporation "does not have the effect of changing any rights of ac- "tion, or of changing the contract relations existing "between the corporation and its debtors. * * * * "Since the receiver of a corporation, as we have already "seen, succeeds to the estate of, and derives his title from, "the corporation, he is bound by all its lawful and au- "thorized acts done before the receivership, and will not "be allowed to disaffirm, or set them aside. As to all "such matters he stands in precisely the same position "as the corporation itself stood before his appointment."

High on Receivers, sec. 318, 319.

"oust any party of his right to the possession of the "property, etc."

Ellicott vs. *Warford*, 4 Maryland Rep., 85.

"The decree, appointing receivers, gave no priority "or superiority of right to the parties upon whose ap- "plication, or in whose behalf it was made. Story Eq. "§ 829. Adams Eq. 355. *It had no effect to change the "title, or create any lien upon the property.*"

WELLS, J.

Ellis vs. *Boston and Hartford Railroad Company*, 107 Mass., 28.

"They (the receivers) represent the bank for the "purpose of closing its concerns, and for no other. They "parted with nothing when they entered upon the dis- "charge of their duties, and they have no rights superior "to those which the bank would have had, if the man- "agement of its affairs had continued with its direc- "tors."

Lincoln vs. *Fitch*, 42 Maine, 469.

"The plaintiff, as receiver of 'The American Mu- "'tual Insurance Company,' takes its notes and assets "subject to all the conditions and legal disabilities with "which they were trammeled in the hands of the corpo- "ration. * * * The receiver stands precisely in the "shoes of the corporation."

Derendorf vs. *Beardsley*, 23 Barb., 659.

"The appointment of a receiver could not operate "to change the nature or terms of these agreements. "Courts have no power, any more than legislatures, to "change and impair the essential obligations of a valid "contract, and to convert a limited and conditional obli- "gation into an unconditional one."

Williams vs. *Babcock*, 25 Barb., 120.

These authorities clearly establish the proposition that a receiver of a corporation *takes no better title than the corporation possessed the instant of his appointment.* The appointment of, and possession taken by, a receiver *enlarge*

no right of ownership, *perfect* no title, *create* no title, *change* no contract regarding title.

The receiver, as the present representative of the court, takes possession of the property, rights and franchises in possession of the corporation, and holds them precisely as the corporation held them, and subject to all conditions and limitations that were binding upon the corporation. In cases in which the appointment of a receiver does not work a forfeiture of the corporate charter—as in railway receiverships—the receiver does not take actual title to the property at all; he only takes possession, and the right of possession; the *title*, remains in the corporation, *unchanged*, *unenlarged*, *undiminished;* the foreclosure proceeds against the corporation, and the title acquired by sale on foreclosure decree is derived from the corporation, not from the receiver. It is, therefore, impossible for the appointment of a receiver to *change*, *enlarge*, *perfect* or *create* title to, or the right of possession of, any of the property in the possession of the corporation at the time of the appointment. The claim that the appointment of a receiver is equivalent to an entry by the mortgagees, even if conceded—we do not think the authorities support the statement, but do not care to discuss the question—does not militate against, or in any degree weaken the proposition as stated, because the entry and possession of a mortgagee, under his mortgage, does not change, or in any degree strengthen the mortgagor's title. Such entry and possession does not give the mortgagee title to, or the right of possession of, *property not owned by the mortgagor*, and, therefore, not covered by the mortgage.

"The right of plaintiffs (mortgagees) can not extend "beyond the property mortgaged: and the right of the "receiver must necessarily have the same limitation."

Noyes vs. *Rich*, 52 Maine, 117.

"Proceedings for the appointment of receivers in "actions for the foreclosure of railway mortgages, are "regarded as *in rem*, to the extent that they seek to "reach such property of the corporation as was mort-"gaged to secure the bondholders. And the right of "the receiver to the possession of the corporate prop-"erty, being subjected to the same limitations governing "the rights of the mortgage bondholders in whose "behalf he was appointed, *extends only to the specific prop-"erty which is the subject of the litigation and covered by the "mortgage.*

High on Receivers, sections 378, 394.

If, therefore, a railway company, at the time a receiver is appointed, has in its possession and use rolling stock—coaches, cars or engines—*not owned by the company*, the receiver acquires no higher or better right to the possession of such rolling stock than the company had; he takes possession of such rolling stock by virtue of the possession the company had of it; *his right of possession is subject to the same conditions and limitations that were obligatory upon the company.* If the company had not acquired title to the rolling stock, the possession taken by the receiver could not *create* title to it. If it was not *owned* by the company, neither the receiver nor the mortagees can claim any title to it by virtue of the receiver's appointment. A railway mortgage, by its terms, reaching future acquired property of the company, does not cover property *never acquired* by the company.

II.

A contract of conditional sale of rolling stock to a railway company,—by the terms of which the railway company, conditional vendee, takes possession, but the conditional vendor retains the title and ownership of the rolling stock until full payment for it is made—is a legal and valid contract, binding upon the railway company and its receiver. Under such a contract, as between the company and its privies and the conditional vendor, the title to the rolling stock does not pass to, or vest in, the railway company until full payment is made.

"Where the right to receive payment before delivery is waived by the seller and immediate possession "given to the purchaser, and yet by express agreement "the title is to remain in the seller until the payment of "the price upon a fixed day, such payment is strictly a "condition precedent, and until *performance* the right of "property is not vested in the purchaser."

1 *Parsons on Contracts*, *449.

"Where the buyer is by the contract bound to do "anything, either precedent or concurrent, on which "the passing of property depends, the property will not "pass until the condition be fulfilled, even though the "goods may have been actually delivered into the pos-"session of the buyer."

Benjamin on Sales, 1 Am. ed., sec. 320.

"A sale and delivery of goods, on condition that the "property is not to vest until the purchase money is "paid or secured, do not pass the title to the vendee until "the condition is performed; and the vendor, in case "the condition is not fulfilled, has a right to repossess "himself of the goods, both against the vendee, and "against his creditors; and also, if guilty of no laches, "the vendor may reclaim the goods so sold and deliv-"ered, even from one who has purchased them from "his vendee in good faith, and without notice."

Story on Sales, sec. 313.

"As has been already stated, mere *delivery* of prop-
"erty, under a conditional contract for future sale, does
"not change it from an executory into an executed
"agreement, and thus vest an immediate title in the
"proposed buyer."

Hilliard on Sales, p. 61.

"Where there is a condition precedent attached to a
"contract of sale and delivery, the property does not
"vest in the vendee on delivery, until he performs the
"condition, or the seller waives it; and the right contin-
"ues in the vendor, even against the creditors of the
"vendee."

2 *Kent's Com.*, *497.

"It is well settled, that where goods are sold and
"delivered on condition that the property therein
"shall not vest in the buyer until the purchase money
"is paid or secured, such payment or adjustment
"of the purchase money is a condition precedent, on the
"buyer's part, to the transfer of title to himself from the
"seller."

2 *Schouler's Personal Property*, p. 292.

It will be observed that these standard authorities go far beyond a full support of the proposition stated. Even the decisions of the Supreme Court of the State of Illinois—upon which counsel for appellant seem mainly to rely—fully sustain our proposition.

"It was a conditional sale, with a right of recision
"on the part of the vendor, in case the purchaser should
"fail in payment of his installments,—*a contract legal*
"*and valid as between the parties*, but made with the risk
"on the part of the vendor of losing his lien, in case
"the property should be levied upon by creditors of the
"purchaser while in possession of the latter."

March v. *Wright*, 46 Ill., 488.

Gibbs v. *Jones*, 46 Ill., 319.

Fawcett, Isham & Co. vs. *Osborn, Adams & Co.*,
32 Ill., 411.

"This was a case of fraudulent sale, of possession "obtained fraudulently, in a case where the vendor "intended to have the title pass with the possession. "*It was not a conditional sale where possession is given, but "title is not intended to pass with possession.* It is insisted, "that as between plaintiff and Jennings, the law is, that "as between them, both parties being innocent, the loss "should fall on the owners who, by intrusting Van "Valin with the possession, enabled him to commit a "fraud. This is unquestionably the law where the own- "ers, with the intention of sale, have voluntarily parted "with possession. *But this principle does not apply to sales "on condition, and where the original owners had never con- "sented to the transfer of the property.*"

Jennings vs. *Sage*, 13 Ill. 613.

In the case of *Herrey et al.* vs. *R. I. Locomotive Works*, 3 Otto, 672, Mr. Justice Davis explains the wide difference between the rulings of the Illinois Court and the Courts of almost every other State in the Union, in the following language:

"The policy of the law in Illinois will not permit the "owner of personal property to sell it, either absolutely "or conditionally, and still continue in possession of it. "Possession is one of the strongest evidences of title to "this class of property, and can not be rightfully sepa- "rated from the title, except in the manner pointed out "by statute. The Courts of Illinois say that to suffer, "without notice to the world, the real ownership to be "in one person, and the ostensible ownership in another, "gives a false credit to the latter, and in this way works "an injury to *third persons*. Accordingly, the actual "owner of personal property creating an interest in "another to whom it is delivered, if desirous of preserv- "ing a lien on it, must comply with the provisions of "the Chattel Mortgage Act. * * * If this be not "done, the instrument, *so far as third persons are con- "cerned*, has no validity."

This seems a strange and incongruous mixing of

things wholly unlike, and is certainly in direct conflict with the vast weight of authority on this question.

How a man can be required to take, and record, a chattel mortgage to preserve a *lien* upon personal property, *when he has never parted with the title to that personal property*, is beyond easy comprehension. The language of the Chattel Mortgage Act, upon which this theory of the Illinois Courts is based is as follows:

"That no mortgage, trust deed or other conveyance "of personal property having the effect of a mortgage "or lien upon such property, shall be valid as against "the rights and interests of any third person, unless "possession thereof shall be delivered to and remain "with the grantee, or the instrument shall provide for "the possession of the property to remain with the "grantor, and the instrument is acknowledged and re-"corded as hereinafter directed; and every such instru-"ment shall, for the purposes of this act, be deemed a "chattel mortgage."

Rev. Stat. of Ill., 1874, p. 711.

How can a contract of conditional sale, as interpreted and explained by the authorities already quoted, be made subject to this law? A contract of conditional sale is *not* a "*mortgage*," it is *not* a "*trust deed*," it is *not* a "*conveyance of personal property having the effect of a mortgage or lien upon such property.*" It can not be a "mortgage" because the *whole title* remains in the vendor. It can not be a "trust deed," because if it were the vendor would have *passed the title* from him. It can not be a "conveyance of personal property," because the conditional vendor has *never parted with his title.*

If A. should lend or hire his reaper and plow to B. for a season's farming, the possession of B. would be just as likely to give a "false credit" to B. as it would if

he had possession of the articles under a conditional contract of sale, and yet the Illinois courts would hardly hold that an agreement to lend or hire personal property comes within their chattel mortgage act. But it is not necessary to discuss this question further. Whether the Illinois decisions are, or are not, well founded in reason upon this point, it is sufficient to know that they fully support the proposition under consideration, viz.: *That a contract of conditional sale is valid and binding as between parties*, regardless of the Illinois Chattel Mortgage Act.

It has already been shown that the receiver stands in the place of the company, and is as much bound by such a contract as is the company. Even if the mortgagees had entered and taken possession from the company without the appointment of a receiver, they would bear precisely the same relation to such contracts of conditional sale that the company sustained. The contracts would be as valid and binding upon them as upon the company, even under the theory of the Illinois decisions, because the only ground upon which these decisions hold such contracts invalid as to *third parties*, is that the *possession* of the property by the conditional vendee tends to cause *third persons* to give the conditional vendee *false credit, based upon his possession*. Mortgagees who gave all the credit they have ever given to the company *long before* the company acquired *any* personal property, and whose only shadow of claim to the property under consideration is based upon the clause in their mortgage covering *future acquired* property of the company, can hardly claim that they have been defrauded into giving

Porter v. *Pettengill*, 12 N. H., 300; *Kimball* v. *Jackman*, 42 *Arnold*, 16 Vt., 382; *Manwell* v. *Briggs*, 17 Vt., 716; N. H., 242; *McFarland* v. *Farmer*, 42 N. H., 386.

In Vermont. *West* v. *Bolton*, 4 Vt., 558; *Bradley* v. *Root* v. *Lord*, 23 Vt., 568; *Davis* v. *Bradley*, 34 Vt., 55; *Clark* v. *Wells*, 45 Vt., 4; *Armington* v. *Houston*, 38 Vt., 448.

In Massachusetts. *Coggill* v. *Hartford and New Haven Railroad Company*, 3 Gray, 545; *Sargent* v. *Metcalf*, 5 Gray, 306; *Burbank* v. *Crooker*, 7 Gray, 158; *Deshon* v. *Bigelow*, 8 Gray, 159; *Hirschorn* v. *Canney*, 98 Mass., 149; *Day* v. *Bassett*, 102 Mass., 445; *Crompton* v. *Pratt*, 105 Mass., 255; *Barrett* v. *Pritchard*, 2 Pick., 512; *Hussey* v. *Thornton*, 4 Mass., 405; *Marston* v. *Baldwin*, 17 Mass., 606.

In New York. *Ballard* vs. *Sampson*, 40 N. Y., 314; *Keeler & Freeman* vs. *Field*, 1 Paige, 312; *Herring* vs. *Hoppock*, 15 N. Y., 409.

In Connecticut. *Forbes* vs. *Marsh*, 15 Conn., 384; *Hart* vs. *Carpenter*, 24 Conn., 427.

In Pennsylvania. *Rose* vs. *Story*, 1 Penn. State, 190; *Agnew* vs. *Johnson*, 22 Penn. State, 471; *Lehigh Company* vs. *Field*, 8 Watts & Sargents. Penn. 232.

In Ohio. *Sage* vs. *Sleutz*, 23 Ohio State, 1; *Roland* vs. *Gundy*, 5 Ohio Reports, 202; *Carmack* vs. *Gordon*, 2 Sup. C. R, 410.

In Indiana. *Thomas* vs. *Winters*, 12 Ind., 322; *Shireman* vs. *Jackson*, 14 Ind., 459; *Plummer* vs. *Shirley*, 16 Ind., 380; *Hamway* vs. *Wallace*, 18 Ind., 377; *Dunbar* vs. *Rawles*, 28 Ind., 225; *Bradshaw* vs. *Warner, et al.*, 54 Ind., 58.

In Missouri. *Parmlee* vs. *Catherwood*, 36 Missouri, 479; *Griffin* vs. *Pugh*, 44 Missouri, 326; *Little* vs. *Page*, 44 Missouri, 412; *Ridgeway et al.* vs. *Kennedy et al.*, 52 Missouri, 24.

In Iowa. *Bailey* vs. *Harris*, 8 Iowa, 331; *Robinson* vs. *Chapline*, 9 Iowa, 91; *Baker* vs. *Hail*, 15 Iowa, 277.

In Kansas. *Owens* vs. *Hastings & Sexton*, 18 Kansas,

446; *Sumner* vs. *McFarland*, 15 Kansas, 600; *Hallowell* vs. *Milne*, 16 Kansas, 65.

In Michigan. *Couse* vs. *Patrick*, 11 Mich., 65; *Fifield* vs. *Elmer*, 25 Mich., 48.

In Wisconsin. *Hunter* vs. *Warner*, 1 Wis., 126; *Goldsmith* vs. *Bryant*, 26 Wis., 34.

In Tennessee. *Price* vs. *Jones*, 1 Head, 84; *Bradshaw* vs. *Thomas*, 7 Yerger, 497; *Gambling* vs. *Read*, 1 Meigs, 281; *Buson* vs. *Dougherty*, 11 Humph., 50.

In North Carolina. *Ellison* vs. *Jones*, 4 Ired., 48; *Parris* vs. *Roberts*, 12 Ired., 268.

In Kentucky. *Patton* vs. *McCane*, 15 B. Monroe, 555; *Chism* vs. *Woods*, Hardin's Rep.'s, 532.

In Georgia. *Goodwin* vs. *May*, 23 Georgia, 205; *McBride* vs. *Whitehead*, 1 Georgia Decis., 165.

In Alabama. *Thompson* vs. *Ray*, 46 Ala., 224.

In Mississippi. *Mount* vs. *Harris*, 1 S. & M., 185.

In Delaware. *Williams* vs. *Connoway*, 3 Houston's Del. Rep.'s, 63.

The two propositions thus far considered, and the authorities cited in support of them, seem clearly and definitely to establish,

1. That a receiver takes no better title than the company; that the appointment of a receiver neither perfects nor creates title; that it in no manner affects or changes title to any property taken into possession, and that the holding and possession of the receiver are the holding and possession of the Court, subject to all contracts, limitations and conditions regarding title that were binding upon the company at the time of the appointment.

2. That a contract of conditional sale of rolling stock—the vendor to retain title until paid for—is a legal and valid contract, binding upon the company and

its receiver; that under such contracts, no title passes until the condition is complied with, and that, as between the company, its receiver and mortgagees, and the conditional vendor, such contracts are valid and binding, even under the decisions of the Courts of Illinois, without recording the conditional contract of sales as a chattel mortgage.

It has further been shown that the authorities, by an overwhelming preponderance, establish the stronger proposition, that contracts of conditional sale—the title to remain in the vendor until full payment is made—are valid and binding against everybody, and that under such contracts, the conditional vendor holds his title absolute against, not only the vendee and his privies, but also against attaching creditors of the vendee, sales on execution levied by creditors of vendee, and even against *bona fide* innocent purchasers without notice.

If these propositions are satisfactorily established, it follows that

III.

If a receiver is appointed and takes possession of a railway while the company has in its possession rolling stock conditionally purchased—the vendor to retain title until payment is made—and not paid for, the receiver takes no higher or better title to such rolling stock than the company held at the instant of his appointment. The company had no title. The appointment of a receiver did not CREATE *title and vest it in him. The company not having acquired the title to such rolling stock, it never became subject to the lien of the mortgage executed by the company, and can not be held by the receiver*

or by the mortagees, except upon the terms of complying with the conditions of the contract of conditional sale. If a receiver uses such rolling stock in the operation of the railway and does not comply with the contract of conditional sale by paying for it, the trust is liable to the owner for the use of the property by the receiver, to be paid for out of the earnings of the trust property while in the hands of the receiver, or out of the proceeds of sale of the trust property, if the earnings have been applied to the benefit of the trust property.

This proposition has been so completely decided by this court, that it will not be necessary to multiply authorities in its support.

The case of *United States* vs. *New Orleans Railroad*, 12 Wallace, 362, was a suit involving the precise question under consideration. It was, in effect, a conditional sale of rolling stock, by the government to the company. At all events the government retained a lien on the rolling stock until full payment was made, and the company agreed not to sell it, or part with it, until payment of the price, without consent of the government. The company had previously executed a mortgage covering *future acquired property*. While the company held possession of the rolling stock so purchased from the government, the previous mortgage was foreclosed, and the mortgagees—just as in the case at bar—claimed the rolling stock under the clause of their mortgage covering future acquired property.

Mr. Justice Bradley, in delivering the opinion of the Court, uses the following language:

"This, we apprehend, is an erroneous view of the "doctrine by which after-acquired property is made to

"serve the uses of a mortgage. That doctrine is "intended to subserve the purposes of justice, and not "injustice. Such an application of it as is sought by "appellants, would often result in gross injustice. A "mortgage intended to cover after-acquired property, "can only attach itself to such property *in the condition* "*in which it comes into the mortgagor's hands.* If that "property is already subject to mortgages or other liens, "the general mortgage does not displace them, though "they may be junior to it in point of time. It only "attaches to such interest as the mortgagor acquires. * * "Had the property sold by the government to the railroad "been rails, as in the case of the *Galveston Railroad Co.* v. "*Cowdrey*, or any other material which became affixed "to, and a part of, the principal thing, the result would "have been different. But being loose property, sus- "ceptible of separate ownership and separate liens, such "liens, if binding on the railroad company itself, are "unaffected by a prior general mortgage given by the "company, and paramount thereto. In the case "before us, the United States, at the time of making the "sale, reserved a lien on the property, and imposed a "condition of non-alienation until the price should be "paid. Taken altogether the transaction amounts to a "transfer *sub modo*, and the lien must be regarded as "attaching to the property itself, and as paramount to "any other liens arising from the prior act of the com- "pany."

In the case of *State of Florida* v. *Anderson et al.*, 1 Otto., 690, the validity of a contract of conditional sale of locomotives was recognized. The contract was held binding upon both the company and its receiver, and the receiver was directed to comply with the condition of the contract by full payment.

In *Williamson* v. *New Jersey Southern Railway Company*, 28 New Jersey Equity Reports, 277, the court held that "A mortgage of after-acquired property can only "attach itself to such property in the condition in which

"it comes to the mortgagor's hands. If it is already "subject to mortgages or other liens, the general mort- "gage does not displace them, though they may be "junior in point of time. It only attaches to such "interest as the mortgagor acquires."

Any different interpretation of the law would make it unjust and inequitable. It is clear, then, that if a receiver, on taking possession of a railway, comes into possession of rolling stock held by the company under contract of conditional sale—the vendor to retain title until payment is made—and not paid for, *the receiver can not hold the property unless he complies with the contract under which the company obtained possession of it.* It is equally clear that the mortgagees can not hold it under the "after-acquired property" clause of their mortgage. If the receiver *uses* rolling stock so held under contract of conditional sale in the necessary operation of the railway and does not acquire the title to it by paying for it according to the contract, is it not equally clear that *the trust* is liable to the owner for the use and necessary repair of the rolling stock while used by the receiver? Neither law, equity nor morality would sanction a negative answer. Out of what fund shall the owner be paid for the use of his property by the receiver? FIRST, all the *earnings* of the trust property while in the hands of the court belong to the court until all the obligations of the court incurred in administering and caring for the trust property are fully paid.

Ellis v. *B., H. and E. R. R.*, 107 Mass., pp. 29–30.

The earnings of the railway, while in the hands of

new or added right to the mortgagees regarding the title by which the company held its rolling stock.

3. That a contract of conditional sale, by the terms of which the vendor retains title until the property is paid for, is a valid contract, binding upon the company, the receiver and the mortgagees.

4. That under such a contract no title passes from the vendor until the condition of the contract is performed. That rolling stock coming into possession of a receiver under such a contract can not be held by the receiver, or by the mortgagees under foreclosure sale, unless the contract is complied with by payment.

5. That the receiver must surrender rolling stock so held to the vendor, or pay for it, and if he surrenders it he must pay for its use and needed repairs while used by him, and that this payment should be made out of the earnings of the railway in the hands of the receiver, as a primary fund for such payments; but, if the earnings have been expended for the benefit of the trust property, then all receiver's debts and operating expenses must be paid out of the proceeds of sale of the trust property.

We believe these propositions cover the main questions involved in the case at bar. If they have been satisfactorily established, the appellants can not succeed.

Respectfully submitted,

McDONALD & BUTLER,

By JOHN M. BUTLER.

Indianapolis, Ind., December 5, 1878.

Supreme Court U.S. Oct. Term 79. Sub. No. 20. W. H. Swayne

Refused

9 Otto 256
Oct. 7. 1878

IN THE

Supreme Court of the United States,

WILLIAM R. FOSDICK, AND OTHERS,
—*vs.*—
THE SOUTHWESTERN CAR COMPANY,
Intervener.

No. 630.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

PETITION FOR MODIFICATION OF MANDATE.

HENRY CRAWFORD,
For Appellants.

CHICAGO:
Beach, Barnard & Co., Legal Printers, 104 Randolph Street.
1879.

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PETITION FOR MODIFICATION OF MANDATE.

No mandate has been as yet presented to the lower court, and no effort made to enforce the decree of payment. The appellants present the following reasons why the court ought to modify the mandate of affirmance.

The opinion being short, it is herewith printed entire, so that the points made thereupon may be better understood.

Mr. Chief Justice WAITE delivered the opinion of the Court:

"This appeal presents another petition of intervention, filed in the suit of *Fosdick & Fish* v. *The Chicago, Danville and Vincennes Railroad Company*. The general facts appearing in that suit are stated in the case of *Fosdick* v. *Schall*, just decided.

"The claim of this intervener, like that of Schall, arises out of a contract for a sale of cars, made with the railroad company on the 10th of January, 1875, a few days before the appointment of the receivers in the State court. The price was secured by the notes of the company on long time, but the title of the cars was to remain in the vendor until the notes were paid. The cars all had upon them marks indicating the ownership of the intervener.

"The petition of intervention was filed January 27th, 1876. It set out the particulars of the contract, and asked that the receiver might be authorized to pay the price and keep the cars, as they were necessary for the profitable equipment of the road. Fosdick & Fish and the intervening bondholders answered, and without denying the material averments in the petition, claimed that notwithstanding the conditions of the sale, the lien of the mortgages was paramount to the title of the intervener. The petition was referred to a master to take testimony and report, but before any report was brought to the attention of the court, if indeed any had been filed, a decree of sale was entered in the principal cause in such form as to direct a sale of the cars in question as part of the railroad. After the sale had been made and confirmed, a report under the order of reference in the petition of intervention was filed. This report was to the effect that the title of the cars had never passed out of the vendor; that the price agreed to be paid, $12,750, was reasonable; that no part of it had been paid; that the cars had been in use on the road since January, 1875, for which no compensation had been made, and that these cars or similar ones were needed for the business of the railroad.

"Fosdick, Fish, and the intervening bondholders excepted on the ground that the lien of the mortgages was paramount to the title of the intervener. Upon the hearing the exceptions were overruled, and as the cars had been included in the foreclosure sale, the clerk was directed to pay the purchase price to the intervener from the fund in court. From this decree the present appeal has been taken.

"According to the decision just made in the case of Schall, the lien of the mortgages upon the cars now in question was subject to the paramount claim of the car company for the price. The intervening petition on file when the foreclosure sale was made was notice to the purchasers that the rights they acquired under the sale would

be subject to the claim of the car company, as finally determined in the further progress of the cause. A restoration of the cars might, therefore, have been decreed to the intervener, notwithstanding the sale. Instead of that the payment of the price from the fund in court has been ordered. We do not understand that objection is made to this if the claim of the intervener is superior to that of the mortgages, as we hold it to be.

" The decree of the circuit court is affirmed."

It will be found on examination of the record on this appeal that the court has partially mistaken the facts of the case, and the opinion is based upon that misconception.

The opinion says:

" The claim of this intervener, like that of Schall, arises " out of a contract for the sale of cars made with the rail- " road company on the 10th of January, 1875, a few days " before the appointment of receivers in the state court. " The price was secured by the notes of the company on " long time, but the title of the cars was to remain in the " vendor until the notes were paid. The cars all had up- " on them marks indicating the ownership of the inter- " vener."

Now this statement only embraces a part of the claim of the car company amounting to $7,250, the purchase price of 15 box cars. We make no request for a review of the argument or opinion as to this branch of the cause.

The principles of the Schall case, as to the money decree therein reversed, applies with greater force to the remaining portion of the South Western Car Company's claim.

The decree of the Circuit Court stands for $12,750. The $5,500 additional to the price of the 15 box cars is for eleven notes of the railroad company for $500 each, given in connection with the construction of certain cars for the Bristol and South Wales Wagon Company and W. Adams, which had been leased to the railroad company.

Such a debt does not fall within any principle which authorizes payment out of the proceeds of sale, as announced in the Schall case.

The intervening petition of the Car Co. distinctly avers that the title to these cars was neither in it or the Railroad Co., but that it had surrendered all right of ownership to those parties who leased to the Railroad Co. (Record, page 74).

The Superintendent of the Car Co. distinctly testified that as to these eleven notes of $500 each there was no security whatever by way of retention of title. (Record, page 83).

The agreement with the lessors, Adams and the Bristol and South Wales Wagon Co., in no way whatever reserved the car title as security for this $5,500 due to the South Western Car Company, or contained any covenant or provision for its payment.

This claim of $5,500 is not one wherein "a restoration "of the cars might have been decreed to the intervener "notwithstanding the sale." It had no incident of a lien whatever. The purchasers make no claim to the leased Adams or Bristol Cars by reason of the sale.

This claim of $5,500 is therefore a mere "general "creditor" debt, and according to the principles laid down in the Schall case, ought not to have been allowed.

It is respectfully submitted, therefore, that the mandate to go down to the Circuit Court ought to affirm only the claim for the 15 cars, viz: $7,250, and reverse the decree for the $5,500, which is clearly an unsecured debt.

HENRY CRAWFORD,

For Appellants.